

Board gave an opinion that the detention of the respondent should be extended for a further period of two years.

Section 11 of the Act deals with the powers of review by the Advisory Board. Section 11(3) and (4) of the Act read as follows:

- (3) Where the Advisory Board has reported that in its opinion the detention or restriction should cease, the Minister shall revoke the detention order or restriction order.
- (4) Where the Advisory Board has reported that in its opinion the detention or restriction should continue, the Minister may continue the detention or restriction of the person concerned.

The learned judge thought that since the Advisory Board had exceeded its powers under s 11(4) by recommending an *extension* of the detention order the exercise of discretion by the Minister was tainted by that recommendation. Counsel for the respondent used the word 'impurity' to describe the recommendation of the Advisory Board and that the recommendation had prejudiced and impaired the decision of the Deputy Minister.

We are of the view that this is an incorrect approach to the interpretation of the power of the Minister under s 11A of the Act. Before he makes an order for the extension of the detention order on the same grounds as the original detention order (as provided in para (aa) of s 11A(1), the Minister need only be satisfied on the same grounds on which the original detention order was made.

It is open to the Minister to consider all information or reports as are available to him. In this case he referred to the police case file and also the report of the Advisory Board. No doubt the report of the Advisory Board made a recommendation which it had no business to make but that should not impair the decision of the Minister. In any case the Minister is not bound by the recommendation of the Advisory Board when it comes to the question of continuing the detention of a detainee under the Act. According to s 11(3) and (4) of the Act, although the Minister *shall* revoke the detention order where the Advisory Board has reported that in its opinion the detention should cease, where the Advisory Board has reported that in its opinion the detention should continue, the Minister still has the discretion whether or not to continue the detention.

It was also argued that in this case the Deputy Minister in his affidavit has not categorically denied that he was influenced or prejudiced by the recommendation of the Advisory Board. There is no necessity for him to do so. In our view so long as he says that he is satisfied after considering all the information available to him that the detention order should be extended on the same grounds on which the order was originally made it is not for the court to question how or why he became so satisfied. There is no non-compliance of the law as held by the learned judge.

A We accordingly allow the appeal and set aside the order of the learned judge.

Appeal allowed.

Solicitors: *Abdul Raman Saad & Associates.*

B Reported by *Prof Ahmad Ibrahim*

Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue

C SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 488 OF 1988
HASHIM YEOP A SANI CJ (MALAYA) HARUN HASHIM
AND GUNN CHIT TUAN SCJJ
26 SEPTEMBER 1989

D *Companies and Corporations — Receivers and managers — Sale of landed property — Liability for real property gains tax — Priority — Companies Act 1965, ss 183(3), 191(2) & 292(1) — Real Property Gains Tax Act 1976, ss 2, 21A & 21B*

E In this case, the appellants had been appointed receivers and managers of a company which was indebted to a bank. The appellants' predecessors as receivers and managers had sold the only asset of a company, a landed property. The total purchase price had been paid to the receivers. The respondents, the Director-General of Inland Revenue, claimed payment of real property gains tax. The appellants applied to the High Court for directions and the learned judge of the High Court held that the respondents were entitled to the amount claimed. The appellants appealed.

F Held, dismissing the appeal:

G The purchaser of the property in this case who was the acquirer under s 2 of the Real Property Gains Tax Act 1976 was statutorily bound to retain the sum payable by the company as real property gains tax until the acquirer receives the certificate of clearance under the Act and as the acquirer had not complied with what it was statutorily bound to do under the Act and had instead passed the whole amount of the purchase price to the receivers, the receivers had received a sum part of which they ought not to have received. The respondent was entitled to the sum being the amount of tax payable on the disposal of the land property. As far as the tax is concerned, the question of priority does not arise.

H Case referred to

1 *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634 (distd)

Legislation referred to

Companies Act 1965 s 183(3), 191(2), 292(1)
Real Property Gains Tax Act 1976 ss 2, 21A, 21B

I Appeal from: Originating Summons No D2-31-174-88 (High Court, Kuala Lumpur)

Ramesh Sanghvi for the appellants.

Balia Yusof bin Hj Wahi (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellants as receivers and managers of Chemetics-Mega Sdn Bhd ('the company') applied to the learned judge in the High Court for directions under s 183(3) of the Companies Act 1965.

The appellants were appointed receivers and managers on 18 March 1988 in succession to Chuah Teong Hooi and Anthony Geoffrey Cooper who had been appointed on 25 April 1983 pursuant to a debenture. On the date of appointment of the first receivers, the company was indebted to the Bank of Nova Scotia, the debenture holder, for the principal sum of \$1,993,636.84 and interest at \$993,863.19.

The appellants' predecessor sold the only asset of the company, a landed property, to one KK Industries Sdn Bhd for \$1,993,636.24 on 5 February 1987.

On 18 July 1987, by a notice of assessment the Director-General of Inland Revenue informed the appellants' predecessor that the tax payable on the disposal of the land property was \$105,461.84 inclusive of a 10% increase for late payment as at 30 September 1987. It is in respect of the payment of this tax that the appellants came before the learned judge for directions as to the priority of payment of the tax since the balance of the proceeds of sale is not sufficient to pay the debenture holder in full if tax is paid in priority to the debt due to the debenture holder.

The learned judge in the course of her judgment referred to the decision of another High Court judge in *Re Golden Palace Musical Hall Sdn Bhd*.¹ In *Re Golden Palace*,¹ the receiver managed to recover from an insurance company a sum of \$295,000 but the Department of Customs and Excise claimed that the sum of \$103,520, being arrears of service tax, had priority over all other claims.

By virtue of s 292(1)(f) of the Companies Act 1965, in a winding up, federal tax ranks sixth in priority if the federal tax is assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired. This provision is one of the two provisions omitted in s 191(2) of the Companies Act 1965 in the application of preferential debts where a receiver is appointed pursuant to a debenture.

The learned judge in *Re Golden Palace*¹ placed great significance on the omission of reference to paras (a) and (f) of s 292(1) in s 191(2) of the Companies Act 1965. The learned judge then circumvented what he thought was a lacuna in the law by applying the rule that a later statute must prevail over an earlier one. The tax he was concerned with was payable under the Service Tax Act 1975 which was a law enacted after the passing of the Companies Act 1965. He said in his judgment:

In my judgment, the answer should be obvious that the earlier Companies Act 1965 must give way to the later Service

A Tax Act 1975 because this is one of the elementary rules of interpretation of statutes as *lex posterior derogat priori*.

I therefore concluded that the claim of the said department was to be paid first before the claim for the said principal and interest of the debenture holder, ie the bank.

B The learned judge in the present case, however, considered that by virtue of s 21B(1)(a) of the Real Property Gains Tax Act 1976 the tax has priority over the amount due to the debenture holder. She summarized her reasoning in her judgment as follows:

C Since gains tax is payable on the sale and the applicants have since been served with a notice of assessment, they must by virtue of the retention provision contained in s 21B(1)(a) set aside \$105,461.84 and it is this same retention provision that makes payment of the gains tax a priority debt over the amount due to the debenture holder.

Applicable in *Re Golden Palace*¹ was the Service Tax Act 1975 where s 52(1) thereof reads as follows:

D Where a receiver is appointed of the property of person to whom a licence under s 8 is issued the receiver shall give notice thereof to the Director-General within fourteen days after the appointment being made and shall before disposing of any of the assets set aside such sum out of the assets as appears to the Director-General to be sufficient to provide for any service tax that is or will thereafter become payable in respect of the taxable service that have been provided or taxable goods that have been sold or provided by that person before the appointment of the receiver.

The relevant taxing law in the present case is the 1976 Act and s 21B thereof reads as follows:

F (1) Where on a disposal to which s 13 applies, the consideration consists wholly or partly of money -
(a) the acquirer shall, until he receives the Director-General's certificate of clearance under s 21A, retain the whole of that money (subject to the reservation that the money retained shall not exceed a sum calculated at the rate at which the tax is for the time being chargeable, on the total value of the consideration).

G There is no real lacuna in the law. In a winding up, federal tax ranks sixth as preferential debt as referred to earlier, ie by virtue of s 292(1) of the Companies Act 1965. Where, however, there is no winding up and a receiver and manager is appointed as in this case, the federal tax is to be paid in accordance with the taxing statute concerned.

H It is clear as the learned judge in this case pointed out that it is the duty of the purchaser of the landed property, in this case KK Industries Sdn Bhd, who is the 'acquirer' under s 2 of the Real Property Gains Tax Act 1976 ('the Act') to retain the sum payable by the company as real property gains tax until the acquirer receives the Director-General's certificate of clearance under s 21A of the Act.

I It is not therefore a question of whether the federal tax is a preferential debt. It is only a question of how and when that tax becomes payable and should be paid by the company being the 'chargeable' person under the Act.

In this case the acquirer did not comply with what it was statutorily bound to do under s 21B(1) of the Act but had instead passed the whole amount of the purchase price to the receivers. The receivers had therefore received a sum part of which they ought not to have received. The Director-General of Inland Revenue was entitled to the sum of \$105,461.84 being the amount of tax payable on the disposal of the landed property. As far as the tax is concerned the question of priority does not arise.

The appeal is accordingly dismissed. We make no order as to costs.

Appeal dismissed.

Solicitors: *Kassim Tadin Wai & Co.*

Reported by *Prof Ahmad Ibrahim*

Chinn Swee Onn v Puchong Realty Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 262 OF 1988
MOHAMED AZMI, HARUN HASHIM AND AJAIB SINGH
SCJJ
23 SEPTEMBER 1989

Bankruptcy — Bankruptcy notice — Application to set aside — Judgment debt — Acceptance of performance from third party — Judgment cannot be enforced or executed — Bankruptcy notice and petition set aside — Contracts Act 1950, s 42

Contract — Judgment debt — Acceptance of performance by third party — Judgment cannot be enforced against debtor — Contracts Act, s 42

In this case, the respondents had obtained judgment by default of appearance against the appellant. Subsequently, the respondents had agreed to forbear to levy execution on the judgment and the respondents agreed to instruct a third party to pay the judgment debt by instalment of \$2,000 a month. The respondents had received \$10,000 from the third party. Nevertheless, they took out a bankruptcy notice against the appellant. The appellant applied to set aside the bankruptcy notice but this application was dismissed in the High Court and later, receiving and adjudication orders were made against the appellant. The appellant appealed.

Held, allowing the appeal:

(1) The respondents, having accepted the performance of the appellant's obligation to pay his debt by a third party, were precluded from enforcing the judgment against the appellant.

(2) In the circumstances, the respondents were not entitled to enforce the default judgment against the appellant. The consequential execution by way of bankruptcy notice and petition was bad and irregular. The bankruptcy notice and bankruptcy petition must therefore be set aside.

Cases referred to

2 *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab bte Nik Jaafar* [1975] 2 MLJ 82 (folded)

A 2 *LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52 (distd)

Legislation referred to
Contracts Act 1950 s 42

Appeal from: Bankruptcy No 42-215-87 (High Court, Ipoh)

B *Chan Kok Keong (DKS Sambanthan (Miss) with him) for the appellant.*
John Fam for the respondents.

Cur Adv Vult

Ajaib Singh SCJ (delivering the judgment of the court):

C This was an appeal by Mr Chinn Swee Onn, a senior member of the Bar practising in Ipoh. He had applied to the High Court at Ipoh to set aside a bankruptcy notice dated 16 March 1987. The bankruptcy notice was based on a judgment obtained by the respondents — Puchong Realty Sdn Bhd — against the appellant by default of appearance in the sum of \$82,392.50. With accumulated interest thereon and costs, this sum had increased to \$136,114.29 when the bankruptcy notice was issued.

The appellant's application to set aside the bankruptcy notice came up for hearing before the learned judge on 14 June 1988. After hearing submissions from counsel for the parties the learned judge deferred his decision for a few days and on 21 June 1988 he dismissed the appellant's application to set aside the bankruptcy notice. Meanwhile the appellant had also been served with a bankruptcy petition dated 6 August 1987. After dismissing the appellant's application on 21 June 1988, the learned judge made receiving and adjudication orders against the appellant pursuant to the bankruptcy petition.

In his affidavit in support of his application to set aside the bankruptcy notice Mr Chinn Swee Onn states, inter alia, as follows:

G I crave leave to refer to the bankruptcy notice dated 16 March 1987 and the creditors petition dated 6 August 1987. The creditors have alleged in both these documents that I am indebted to them in the sum of \$136,114.29. I deny that I am indebted to them in the said sum or any other sum.

H I further say that the creditors took judgment in default against me in Ipoh High Court Civil Suit No 344 of 1983 and Ipoh Sessions Court Civil Action No 701 of 1983 for a total of \$102,392.50 on the mutual understanding and on the judgment creditors' undertaking that they will forbear to levy execution against me and in return I will instruct Hock Hin Leong Sdn Bhd of No 73 Jalan Leong Sin Nam, Ipoh to take over the judgment debt and forward to the judgment creditors the sum of \$2,000 per month.

I Relying on their aforesaid agreement and undertaking of the judgment creditors, I then authorized Hock Hin Leong Sdn Bhd to forward to the creditors the said sum of \$2,000 per month. A copy of my letter dated 27 May 1985 addressed to Hock Hin Leong Sdn Bhd is now shown to me and marked 'CSO-1'. Since then the judgment creditors have accepted payment from the said Hock Hin Leong Sdn Bhd but the total amount received by them is not known to me.